SEP 27 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

THE UNITED STATES TELEPHONE ASSOCIATION
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September 27, 1999

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SUMMARY

Consistent with the views USTA supported in its initial comments, USTA primarily replies that the Commission can not assert jurisdiction over premises owners in multi-tenant environments (MTEs); that the Commission should not determine that riser cable/inside wire and conduit constitute Unbundled Network Elements (UNEs); that private in-building facilities do not exists in or on public rights-of-way and consequently can not be subsumed under the FCC's regulatory net; and that ILECs should not be required to sub-loop unbundle. Further, in support of USTA member, Ameritech in its comments in this matter, USTA agrees with Ameritech that if the FCC adopts an approach to exclusive contracts for MTE building access, the rules should be applied equally to all providers.

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REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

I. INTRODUCTION

The United States Telephone Association ("USTA"), as the principal trade association for the local exchange carrier industry, on behalf of its members, respectfully files these reply comments concerning the Federal Communications Commission's ("FCC" or "Commission") notice of inquiry and third further notice of proposed rulemaking in the above-captioned proceeding.[1]

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[1] *Notice of Proposed Rulemaking and Notice of Inquiry in WT docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98* ("NPRM") (adopted, Jun.

II. REPLY COMMENTS

A. The FCC should not exert jurisdiction over MTE premises owners. USTA's posits that hundreds of parties, primarily real estate interests[2] and USTA members, strongly identified with the basic premise USTA advocated in its initial comments in this matter: that the Commission should not assert jurisdiction over premises owners in order to enable access to inside wire/riser cable and conduit by competitive telecommunications providers (CLECs) in MTEs. Based on the various concerns and rationales articulated, and notwithstanding comments made to the contrary,[3] USTA believes the issue of exerting jurisdiction over premises owners to enable access to MTEs by CLECs far exceeds prudent Commission policy and the scope of the FCC's authority to regulate in this area. Consequently, USTA urges the Commission to refrain from such an inappropriate course of action.

Issues concerning the balancing of private property rights and pro-competitive telecommunications policy should be left to legislative bodies such as the United States Congress.

10, 1999; released, July 7, 1999; with the date extended by *Order Extending Pleading Cycle* (adopted and released, Aug. 6, 1999).

[2]*See e.g.,* Joint Comments of Building Owners and Managers Association International, Institute of Real Estate Management, International Council of Shopping Centers, Manufactured Housing Institute, National Apartment Association, National Association of Home Builders, National Association of Industrial and Office Properties, National Association of Real Estate Investment Trusts, national Association of Realtors, national Multi Housing Council and National Realty Committee/The Real Estate Roundatabe (the "Real Access Alliance")(Aug. 27, 1999); and the multitudes of other real estate interest that filed in this proceeding.

[3]*See e.g.,* Comments of Winstar Communications, Inc. (Aug. 27, 1999) at 32-34 (suggesting that the Commission can exercise jurisdiction over building owners and managers).

B. Private in-building facilities do not exists in or on public rights-of-way. Consistent with its original comments and contrary to the assertions of other parties in this proceeding,[4] USTA submits that areas within private buildings do not constitute, and never have been deemed, public-rights-of-way. Determining otherwise would be contrary to the accepted concept of private-land ownership, as established in the United States. Thus, for the Commission to determine that private property entails a public right-of-way would raise serious issues concerning FCC jurisdiction and, again, constitute an action that invites constitutional challenge.[5] Additionally, it would give tenant's absolute veto power over premise owners with respect to the premise owner's determination of who the premise owner wants to allow access to his/her property. Consequently, the FCC should not reach such a conclusion. As USTA recommended in its original comments and replies here to parties who hold the opposite view, a decision of this magnitude should be left to the legislature.

C. Riser cable/inside wire and conduit should not be deemed UNEs. USTA strongly supports this position taken by its members and USTA in the original comment round of the proceeding.[6] USTA articulated in its original comments, *inter alia*, that the FCC cannot unilaterally impose additional unbundling obligations on ILECs; and that no party has shown that riser

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[4]*See e.g,* Comments of the Fixed Wireless Communications Coalition (Aug. 27, 1999) at 8.

[5]For the FCC to open up this door could mean that any jurisdictional forays in this area could stem futher beyond the areas containing or surrounding inside wire, riser cable and conduit.

[6]*See* USTA comments filed in the NPRM (Aug. 27, 1999); etc. at 13-14. *See also,* Comments of GTE (Aug. 27, 1999) at 18; Comments of Cincinnati Bell Telephone Company (Aug. 27, 1999) at 9-10; Comments of SBC Communications Inc. (Aug. 27, 1999) at 2-3, 8; Comments of Bell Atlantic (Aug. 27, 1999) at 4-5; and Comments of Ameritech (Aug. 27, 1999) at 4-8.

cable/inside wire or in-building conduit owned or controlled by ILECs meet the "necessary and impair" standard set forth in section 251(d)(2) of the Telecommunications Act of 1996, as interpreted by the U.S. Supreme Court in AT&T Corporation v. Iowa Utilities Board.[7]

The FCC, in its adopted but not released September 15, 1999 Commission decision[8], appears to have ruled with respect to inside wire "owned" by ILECs in MTEs. Beyond the fact that inside wire may not have been proven to meet the necessary and impair standard in USTA's view[9], USTA further believes that the Commission lacks a record in this proceeding, as well as in the UNE Remand Procceding, to make ILEC owned or controlled inside wire a UNE.

Further, to the extent that small ILECs will have to address the burdens of any such challenge regarding ownership, the Commission should have addressed this matter in the context of a Regulatory Flexibility Analysis. To the degree that this is not addressed in the Commission's UNE remand decision, once it is released, nor to the extent this has not been noticed in this proceeding, USTA believes such consequence may present significant questions that must be addressed in an

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[7]AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999) (*Iowa Utilities Board)*, *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12460 (1997), *appeals docketed, Second Further Notice of Proposed Rulemaking*, FCC 99-70 (rel. Apr. 16, 1999) (*UNE Further NPRM*).

[8]*See* "FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements", *Public Notice* regarding the FCC's Third Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (FCC 99-238) (Sept. 15, 1999).

[9]Notwithstanding any statements made in this proceeding about ILEC owned inside wire constituting a UNE, USTA does not waive any rights it may have in this matter or elsewhere to challenge matters concerning ILEC owned inside wire in buildings not owned by the ILEC constituting a UNE, on behalf of its membership.

appropriate and lawful manner.

D. USTA opposes the position some advocated in comments that ILECs should be required to sub-loop unbundle.[10]

E. If the FCC adopts an approach to exclusive contracts for MTE building access, the rules should be applied equally to all providers. USTA supports the viewpoint that "if the Commission adopts any rule prohibiting carriers from entering into exclusive contracts for building access, it must apply in a uniform and nondiscriminatory manner to all carriers."[11] There is no factual basis in the record to support the conclusion that CLECs are any more disadvantaged by exclusive contracts for MTEs than ILECs.

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[10]*See e.g.,* Comments of Optel, Inc. (Aug. 27, 1999) at 9; Comments of Metromedia Fiber Network Services, Inc. (Aug. 26, 1999) at 3; Comments of General Communications, Inc. (Aug. 27, 1999) at 2;

[11]Comments of Ameritech at 10-11.

III. CONCLUSION. The Commission should take action consistent with the positions advocated by USTA in both its comments and reply comments in this matter.

Respectfully submitted,

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September 27, 1999

CERTIFICATE OF SERVICE

I, Nicole Shackelford, do certify that on September 27, 1999, Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

Nicole Shackelford